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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD HOM, an individual on
behalf of himself and JUSTIN
KELLEY, an individual, on behalf of
himself, and on behalf of all persons
similarly situated,

Plaintiff,

vs.

DHL EXPRESS (USA), INC., an Ohio
corporation conducting business in the
State of California, and Does 1 to 10.

Defendants.

CASE NO. C 08-03756 JL

DECLARATION OF STEPHEN B.
MORRIS IN SUPPORT OF MOTION
FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT

Date: April 14, 2010
Time: 9:30 a.m.
Room: Courtroom F
Judge: Honorable James Larson

I, Stephen B. Morris, declare as follows:

1. I am an attorney at law duly licensed to practice in the State of
California and the U.S. District Courts in California, and am one of the attorneys
representing Plaintiffs Richard Hom and Justin Kelley against Defendant DHL

1 Express (USA), Inc. (“DHL”) in this action. I make this declaration in support of
2 the Joint Motion for Final Approval of Class Action Settlement. I have personal
3 knowledge of the facts set forth below, except as to such matters as may be stated
4 on information and belief, and if called upon as a witness, I could and would
5 competently testify thereto.

6 7 **Background of Action**

8 2. On August 6, 2008, Plaintiffs Richard Hom and Justin Kelley filed a
9 Complaint in the Northern District of California against DHL on behalf of
10 themselves and all other Field Service Supervisors who worked at DHL
11 nationwide. In their Complaint, Plaintiffs alleged that DHL incorrectly classified
12 the Field Service Supervisor position as exempt from payment of overtime under
13 California law and Federal law. Due to this alleged misclassification, Plaintiffs
14 alleged they were entitled to overtime pay under the Fair Labor Standards Act, and
15 California Labor Code sections 510, 515, 1194, and 1198; compensation for missed
16 meal and rest periods pursuant to California Labor Code sections 226.7 and 512;
17 waiting time penalties according to Labor Code section 201-203; penalties for
18 inaccurate itemized wage statements pursuant to Labor Code section 226(a); and
19 restitution and injunctive relief in accord with California Business and Professions
20 Code section 17200; as well as interest and attorneys fees. While the Complaint
21 was initially filed on behalf of a nationwide class, on May 15, 2009, the Court
22 signed an Order Dismissing the FLSA Cause of Action and references to a
23 nationwide class pursuant to the parties’ joint request. Thereafter, the lawsuit has
24 been pursued on behalf of California employees only.

25 3. Plaintiffs contend that they were incorrectly classified as exempt
26 employees. They contend that they did not meet the test for the exemption in part
27 because they did not have sufficient independent judgment and discretion in
28 carrying out their job duties and because they did not spend more than 50% of their

1 time performing exempt tasks. Plaintiffs claimed that as all Field Service
2 Supervisors were performing essentially the same job functions their claims were
3 appropriate for class treatment.

4 4. At all points during this litigation, DHL disputed, and it continues to
5 dispute, Plaintiffs' allegations, expressly denying any liability for any of the claims
6 that Plaintiffs or the Class have raised or could have raised.

7 5. Although I believe that Plaintiffs would be able to certify the Class, I
8 am cognizant of the significant legal uncertainties associated with class action
9 misclassification cases. Such claims can be factually complex and require
10 protracted litigation to resolve. Moreover, DHL through its counsel, has presented
11 several good faith objections to Plaintiffs' ability to certify the class. For example,
12 DHL maintains that resolution of these issues requires an individualized analysis of
13 how each class member carries out his or her job duties and responsibilities,
14 because each Field Service Supervisor has a unique experience based upon the
15 location and size of their station, their work schedule, the management style of
16 their supervisor, the number of employees they supervise and the presence of
17 unionized employees and/or independent contractors at their station.

18 6. While I also believe that Plaintiffs could prevail on the merits of their
19 claims, I recognize that it would require a considerable showing in order to
20 overcome DHL's significant defenses to their misclassification claim. To begin,
21 DHL has indicated that many of the DHL locations are covered by collective
22 bargaining agreements containing a work preservation clause. As a result, non-
23 bargaining unit employees, such as the Field Service Supervisors, are prohibited
24 from performing non-exempt bargaining unit work such as moving, sorting or
25 driving packages or dealing with routine customer inquiries. Second, DHL
26 presented evidence that the company's expectation is that Field Service
27 Supervisors are performing an exempt job. The Field Service Supervisor job
28 description and management training, the annual reviews which assess their

1 abilities with respect to performance of exempt job functions, coupled with the
2 deposition testimony of DHL managers Jeff Funk and John Fasullo make it clear
3 that DHL considers the Field Service Supervisor part of the station's management
4 team. Third, DHL presented evidence that many Field Services Supervisors
5 interviewed by counsel attested to the fact that they were indeed performing their
6 jobs in an exempt manner. DHL argued that to the extent that Plaintiffs contend
7 they spent significant time performing non-exempt work, they did so in
8 contravention of the company's legitimate and communicated expectations.

10 **Settlement Discussions**

11 7. After completing several key depositions and engaging in initial
12 written discovery, the Parties agreed to engage in a mediation. In anticipation of
13 the mediation, DHL Counsel provided me with information regarding the number
14 of putative Class Members, their average rate of pay, and the average number of
15 weeks each putative Class Member worked within the limitations period.

16 8. On August 6, 2009, the Parties attended a mediation session presided
17 over by Michael Loeb of JAMS, a mediator with significant experience in wage
18 and hour class actions. Each Party was represented by their respective counsel
19 during the good-faith negotiations facilitated by Mr. Loeb. While the Parties were
20 unable to reach agreement at the mediation, the Parties continued to negotiate for
21 several weeks following the mediation, assisted by Mr. Loeb. At the conclusion of
22 the additional negotiations, on September 4, 2009, the Parties signed a
23 Memorandum of Understanding outlining the key elements of the agreed upon
24 settlement.

26 **Investigation By Plaintiffs' Counsel**

27 9. I have conducted a thorough investigation into the facts of this case,
28 and have diligently pursued an investigation of the Class Members' claims against

1 DHL, including (1) interviewing Class Members and analyzing the results of Class
2 Member interviews; (2) reviewing relevant documents; (3) researching the
3 applicable law and the potential defenses; and (4) taking the depositions of DHL
4 managers. Based on this, I am of the opinion that the Settlement is fair, reasonable
5 and adequate and is in the best interest of the Class in light of all known facts and
6 circumstances, including the risk of significant delay, defenses asserted by DHL,
7 and potential appellate issues.

8 9 **Background of Class Counsel**

10 10. I am experienced in class action wage-and-hour litigation and have
11 collectively represented more than 50 classes in similar cases. I have significant
12 knowledge of the relevant facts given my firm's independent investigation prior to
13 mediation and the disclosures provided by DHL in anticipation of that proceeding.
14 My general background, qualifications and experience are attached as Exhibit "1".
15

16 **Stephen B. Morris**

17 11. I received my B.S. from the University of Southern California and my
18 J.D. from The University of San Diego. I was admitted to the California State Bar
19 in 1987 and have extensive experience in employment law disputes. I have been
20 lead counsel in approximately 15 prior employment class actions cases that have
21 been litigated to resolution and I am currently lead counsel in approximately 15
22 other wage and hour class action lawsuits. I have worked on many class action
23 matters in the capacity as class counsel. Attached as Exhibit 1 is my firm's resume
24 with a list of class actions where I was lead or co-lead counsel.
25

26 **Walter Haines**

27 12. I am informed and believe that:
28

a. Mr. Haines received his B.A. from Pace University and his law

1 degree from the San Fernando Valley College of Law. He has been a practicing
2 attorney for more than 30 years.

3 b. In February 2005, he created the law firm known as United
4 Employee Law Group for the sole purpose of prosecuting wage-and-hour claims on
5 behalf of employees.

6 c. He has represented well over 500 clients in wage-and-hour
7 disputes and is currently co-counsel on numerous wage-and-hour class actions.
8

9 **Fairness and Reasonableness of Settlement**

10 13. I believe that the Settlement is fair and reasonable and warrants
11 approval by the Court. The Settlement resulted after arms' length settlement
12 negotiations under the supervision of Michael Loeb of JAMS, an experienced
13 mediator, who recommended the Settlement.

14 14. The Settlement is fair and reasonable because it provides substantial
15 and immediate benefits to the Class Members. The Settlement is jointly presented
16 as the product of extensive arms' length negotiations by experienced counsel on
17 both sides after sufficient exchange of information to allow both sides to recognize
18 the strengths and weaknesses of each other's positions. In calculating the
19 appropriate settlement amount, the Parties had sufficient information, and had
20 conducted an adequate investigation to allow them to make an educated and
21 informed analysis and conclusion.

22 15. Although I believe that Plaintiff's claims are meritorious and that
23 Plaintiffs would eventually prevail, I have also considered factors such as the
24 substantial costs of continued litigation and the possibility that the case, if not
25 settled now, might not result in any recovery or might result in a recovery several
26 years from now that is less favorable to the Class than that offered by the
27 Settlement. In light of such considerations, I am satisfied that the terms and
28 conditions of the Settlement are fair, reasonable and adequate and that the

1 Settlement is in the best interests of the Classes.

2
3 **Plaintiffs' Class Representative Payment**

4 16. As part of the Settlement, Plaintiffs Hom and Kelley each seek a class
5 representative payment of Eight Thousand Five Hundred Dollars (\$8,500) in
6 recognition of their time and efforts on behalf of the Class and the risk they
7 assumed of costs and other liabilities if the case proved unsuccessful. The
8 Plaintiffs supplied my office with relevant documents, made themselves available
9 for numerous detailed and lengthy discussions and supplied invaluable information
10 and appeared for their depositions. These two (2) Plaintiffs went well beyond what
11 was required of them, as they performed their own independent research and
12 surveys of past employees. I estimate that each of them spent 50 - 60 hours of their
13 time (including deposition time) on this matter.

14
15 **Class Counsel's Attorneys' Fees, Expenses, and Costs**

16 17. As part of the Settlement, Class Counsel requests an award of
17 attorneys' fees of One Hundred Eighty Five Thousand Dollars (\$185,000). This is
18 equal to 25% of the Seven Hundred and Forty Thousand Dollar (\$740,000)
19 Settlement Amount, under the "percentage of the benefit" theory. This requested
20 fee falls on the lower end of the historical range of attorneys' fee awards, which is
21 generally from 20% to 50% and is equal to the Ninth Circuit's benchmark for such
22 fees. The requested fee is fair compensation for undertaking complex, risky, and
23 time-consuming litigation on a contingent basis.

24 18. The requested fees and costs are fair compensation for undertaking
25 complex, risky, expensive, and time-consuming litigation solely on a contingency
26 basis, which have resulted in appropriate benefits to the class members. My firm
27 has borne the entire risk and costs of litigation for this case, all on a purely
28 contingent basis. This has been possible through the use of my firm's line of credit

1 which allowed me to devote my time and that of my firm, with all of its resources,
2 to this matter instead of hourly work which would otherwise be required to fund
3 my office. In light of the substantial benefits to the class members and the
4 contingent nature of the action, the requested attorneys' fees and costs are
5 reasonable.

6 19. My normal hourly rate for class action litigation is \$545 per hour,
7 which, based on surveys conducted by me is a rate consistent with other class
8 action plaintiff's counsel with similar experience practicing in San Francisco. I
9 was the primary counsel with responsibility for this class case. In addition, I am
10 informed and believe that my hourly rate is commensurate with defense counsel's
11 billing rate. My hourly rate has been approved in numerous class actions,
12 including *Lee v. Timberland*, Northern District of California, Case No. C07 02367
13 JF; *Egan v. Fidelity Information Services*, Central District of California, Case No.
14 CV07-6374; *Lopez, et al. v. KB Home*, Los Angeles Superior Court, Case No. BC
15 381211; *Ulloa v. Nordstrom, Inc.*, San Diego Superior Court, Case No. 37-2007-
16 00068014-CU-BT-CTL; *Perez, et al. v. Personal Touch*, Orange Superior Court,
17 30-2008-00180045¹.

18 20. My firm is a boutique firm. We limit our case intake to between 10-15
19 cases at any one time. Most of the work is performed by me, except for initial
20 discovery preparation, discovery responses, initial case intake documentation and
21 other work, mostly discovery related, which I assign to my paralegal staff and
22 supervise accordingly.

23 21. Here, the case was originally accepted by Walter Haines at United
24 Employees Law Group. That firm performed its standard screening and intake
25 procedures which I am informed and believe took approximately 5 hours of
26 attorney time and 4 hrs of paralegal time. Mr. Haines bills at a rate of \$350 per hr.
27

28 ¹ My hourly rate was \$525 per hour until January 1, 2009 when it increased to \$545 per hour.

1 His Case Intake Manager bills at \$210 per hr. The Haines lodestar is thus
2 \$2,790.00. The Haines firm specializes in class action employment matters and
3 currently has over 50 active cases in which they are co-counsel. Because my firm
4 conducted its own intake review, we have not included this amount in the total
5 lodestar.

6 22. The matter was referred to my firm and we conducted our own
7 independent evaluation of the case, researching the applicable law, meeting with
8 the clients, and searching out data regarding the target defendant, including running
9 a litigation search. I have spent 243 hours on this case, which break down as
10 follows: 15 hours pre-litigation research, speaking with the clients and co-counsel;
11 37.5 hours researching, preparing and reviewing pleadings, such as the motions for
12 preliminary and final approval; 11 hours reviewing documents produced by
13 opposing counsel and following up regarding the documents with our clients; 11.25
14 hours of telephone, letter and e-mail conferences with opposing counsel, potential
15 experts and the Plaintiffs; 51.5 hours researching the specific exemption issues at
16 issue here, and performing the initial preparatory work for the class certification
17 motion, which was not filed, researching and reviewing legal memoranda from co-
18 counsel; 12 hours on staff meetings (conducted weekly) reviewing assignments and
19 internal work product, correspondence; 5.75 hours preparing discovery demands;
20 23.25 hours communicating with clients; 45.75 hours preparing for, traveling to
21 and from and attending the depositions and court appearances (this includes an
22 estimate of the time for attending the Final Approval Hearing); 22.75 hours in
23 preparation for and attending the mediation; and 7.25 hours following up with the
24 mediator and opposing counsel after the mediation. My head paralegal, Angelina
25 Rudd, whose billing rate is \$210.00 per hour, has spent 178 hours on this matter
26 primarily conducting interviews of potential witnesses and reviewing and
27 summarizing those interviews and research. Jenna Sarinas, a paralegal in my office
28 whose billing rate is \$165.00, has spent approximately 122 hours on this case

1 performing tasks at my direction, principally relating to discovery and review and
2 summary of documents. My firm's lodestar is \$189,945.00.

3 23. In the nineteen months since we first received the information on this
4 case on July 14, 2008, I have billed a total of 243 hours on this matter for a lodestar
5 of \$132,435.00. The total billed by my staff is \$57,510.00, which, as set forth
6 above, was for litigation support, primarily regarding discovery and compilation of
7 data. The total of these amounts is \$189,945.00. The requested fee in the sum of
8 \$185,000.00 is fractionally less than our lodestar.

9 24. My firm has incurred out of pocket costs in the amount of \$10,470.40.
10 However, we have agreed to limit our reimbursement request to \$10,000.00.
11 Therefore, we request expenses in the amount of \$10,000.00. A detailed listing of
12 those expenses is attached hereto as Exhibit "2".

13 I declare under penalty of perjury under the laws of the United States
14 that the foregoing is true and correct.

15 Executed on March 8, 2010, at San Diego, California.

16
17 /s/
18 _____
Stephen B. Morris

EXHIBIT 1

MORRIS AND ASSOCIATES

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FIRM RESUMÉ

Morris and Associates is a full-service law firm handling cases involving consumer class actions, insurance bad faith, employment claims, serious personal injury, and complex business litigation. The firm works primarily on a contingency basis. In the past ten years, a substantial portion of Morris and Associates' practice has been representing consumers in class actions. A list of past and pending class actions litigated by Morris & Associates is attached.

ATTORNEY BIOGRAPHY

Stephen B. Morris, the Principal of the Firm, has litigated multiple consumer class actions across the country since 1987, with his principal area of practice in California since 1986. Mr. Morris graduated from the University of San Diego School of Law in 1986, after obtaining his bachelor's degree at the University of Southern California in 1982. Having represented clients and having served as lead counsel in multiple consumer class actions, Mr. Morris has a proven track record of obtaining significant results by settlement, judgment or jury verdict.

MORRIS AND ASSOCIATES

Past and Pending Class Actions

Albaisa v. Sprint, San Diego Superior Court, Case No. GIC 795021

Blando v. Nextel, Western District of Missouri, Case No. 02-0921-FJG

Caushon v. General Motors, San Diego Superior Court, Case No. GIC 806975

Crane v. Bio-Hydration, San Diego Superior Court, Case No. GIC 822855

Santone v. AT&T, San Diego Superior Court, Case No. 717114 consolidated with Sparks v. AT& T, U.S. District Court of Illinois Case No. 96-LM-983

Hart v. U.S. Tobacco, Los Angeles Superior Court, Case No. GIC BC 278460

Heon v. Samsung, San Diego Superior Court, Case No. GIC 810057

Michaelson v. Sprint Telephony PCS, et al., San Diego Superior Court, Case No. GIC 817774

Palacios v. Pacific Bell, San Diego Superior Court, Case No. GIC 760321

Peralta v. Hyatt Corp., San Diego Superior Court, Case No. 767837

Potter v. Zodiac, San Diego Superior Court

Whitney v. Alltel Communications, Inc., Circuit Court of Cole County, Missouri, Case No. 02CV326-131

Schiff v. EON, San Diego Superior Court, Case No. N82633

Ralphs v. Blockbuster, Inc., San Diego Superior Court, Case No. GIC 736128

Padilla, et al. v. Kraft, Orange County Superior Court, Case No. 07CC00009

Lee v. Timberland, Northern District of California, Case No. C07 02367 JF

Cantey, et al. v. Brinks, Los Angeles Superior Court, Case No. BC364638

Egan v. Fidelity Information Services, Central District of California, Case No. CV07-6374

Lopez, et al. v. KB Home, Los Angeles Superior Court, Case No. BC 381211

Ulloa v. Nordstrom, Inc., San Diego Superior Court, Case No. 37-2007-00068014-CU-BT-CTL

Human v. Acosta, Inc., USDC, SD California, CV 10-237

Jarratt v. American Express, USDC, SD California, 09-CV-425

Stryuk v. AT&T Mobility, USDC, SD California, 07-CV-1314

Gusman v. AT&T Moility, San Diego Superior Court, 37-2009-00100556-CU-BC-CTL

Respinto v. AT&T Mobility, USDC, ND Georgia, 09-CV-3380

Simon, et al. v. AT&T Mobility, USDC, CD California, CV-10-0791

Sipple v. AT&T Mobility, USDC, SD California, 10-CV-0184

Moss v. Bakers Footwear, USDC, CD California, 08-CV-345

Sarinas v. Best Buy, San Diego Superior Court, 37-2009-00086540

Hom, et al. v. DHL, USDC, ND California, C 08-03756

Kunze v. Guitar Center, San Diego Superior Court, 37-2009-00096940

Englaterra v. Lifesteps Foundation, Los Angeles Superior Court, BC410581

Coy v. Mapleton Communications, Monterey Superior Court, M100046

Mann v. McMillan, San Diego Superior Court, 37-2009-00101911

Alfi v. Nordstrom, USDC, SD California, 09-CV-1249

Perez, et al. v. Personal Touch, Orange Superior Court, 30-2008-00180045

Marilao v. PetSmart, San Diego Superior Court, 37-2009-00086842

Gilchrist v. Silver Star, Ventura Superior Court, 56-2009-00356361

Cornacchia v. Spot Runner, Los Angeles Superior Court, BC 414895

Westling v. Subway, USDC, SD California, 09-CV-2630

Payne v. Super Suppers, Orange Superior Court, 30-2009-00120074-CU-BT-CJC

Valenzuela v. Time Warner, USDC, CD California, CV 09-8937

Borrero v. The Travelers Indemnity Co., USDC, ED California, 10-CV-00322

O'Shea v. VTEX Global, San Diego Superior Court, 37-2009-00101937-CU-OE-CTL

Rudd v. American Express, USDC, SD California, 09-CV-930

Venegas v. WRM Security, San Diego Superior Court, 37-2010-00085793-CU-BT-CTL

Block v. Wyndham, San Francisco Superior Court, CGC-09-495517

Barclay v. VISA USA, USDC, SD California, 09-CV-02932

EXHIBIT 2

Morris and Associates

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Expenses

Hom, et al. v. DHL

<u>DATE</u>	<u>EXPENSE</u>	<u>AMOUNT</u>
07/30/08	Clerk U.S. District Court	\$350.00
08/13/08	Diversified Legal	\$32.50
08/18/08	Diversified Legal	\$52.50
04/16/09	JAMS, Inc.	\$3,175.00
07/03/09	Corporate Consult re: DHL corporate structure	\$1,500.00
07/15/09	American Express (Depo expenses)	\$620.71
07/23/09	Sarnoff Information Technologies, Inc.	\$455.50
07/29/09	Sarnoff Information Technologies, Inc.	\$707.20
08/12/09	JAMS, Inc.	\$257.85
08/14/09	American Express (mediation expenses)	\$818.34
08/14/09	American Express (depo transcripts)	\$612.80
08/30/09	American Express (mediation expenses)	\$315.49
	Cash Expenses for mediation & depositions	\$265.00
	Copying fees (2,468 copies @\$.25 each)	\$617.00
	Postage	\$144.14
	On-line Research	\$546.37
	Total	\$10,470.40